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ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL**

Present

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JEOPARDY! PROSECUTOR ETHICS EDITION!

Example Motion

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Example Motion

WILLIAM MONTGOMERY
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,)	
)	
Plaintiff,)	
)	
vs.)	
)	
JASON NEIL NOONKESTER)	CR2010-0138281-001-DT
)	
Defendant.)	
)	STATE'S RESPONSE TO MOTION TO
)	DETERMINE COUNSEL
)	
)	(Assigned to The Honorable Joseph
)	Kreamer)

The State of Arizona, by and through undersigned counsel, hereby responds to the Defendant's Motion to Determine Counsel. For the reasons stated in the accompanying Memorandum of Points and Authorities, the State respectfully asks this Court to remove the Office of the Legal Advocate ("OLA") from representing the Defendant in this matter.

Submitted September __, 2017.

WILLIAM MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY: /s/ _____
/s/ Elizabeth Ortiz
Special Prosecutor

MEMORANDUM OF POINTS AND AUTHORITIES

The Defendant is charged with one count of First Degree Murder, one count of Burglary in the First Degree, two counts of Sexual Assault, one count of Attempted Sexual Assault, and three counts of Kidnapping. The State has filed a death penalty allegation.

The charges arise out of a crime spree on July 24, 2011, wherein, *inter alia*, K. J. was sexually assaulted multiple times.¹ Additionally, K.J. and her two minor children, A. J. and C. W., were kidnapped by being forced and locked into a bathroom by the assailant.

The OLA was appointed to represent the Defendant in this case. The defense motions and arguments to this Court have focused extensively on K. J.'s juvenile and adult criminal history, her substance abuse issues, and the resulting severance of her parental rights.

In July of 2014, the State provided supplemental disclosure which detailed, *inter alia*, the severance proceedings where K. J.'s parental rights to A. J. and C. W. were terminated. Those documents revealed that the OLA represented both A. J. and C. W. in the dependency case against K. J.

The defense, recognizing what is, at a minimum, the appearance of a conflict-of-interest arising out of both representing a capital defendant and the victims, filed a Motion to Determine Counsel.

The Arizona Supreme Court has set forth detailed rules regarding a lawyer's ethical duties to both current and former clients, which are imputed to all lawyers within a firm. These rules have been repeatedly applied by the courts when determining whether a lawyer must be removed from a case due to a conflict-of-interest. "A lawyer's overriding duty of loyalty to a client is a basic tenet of the attorney-client relationship. Inherent in this

¹ The victims will be referred to by their initials to protect their privacy.

principle is the concept that no other interest or consideration should be permitted to interfere with the lawyer's loyalty to his client." *Matter of Estate of Shano*, 177 Ariz. 550, 869 P.2d 1203 (App.1993). Further, the Arizona Supreme Court has recognized that, "An attorney's loyalty to his client is not just a casual obligation to be turned on or off as the dictates of the moment indicate or particular employment may demand." *Matter of Evans*, 113 Ariz. 458, 556 P.2d 792 (1976). Finally, even the appearance of impropriety and of a conflict-of-interest is enough to warrant the removal of counsel. *Gomez v. Superior Court*, 149 Ariz. 223, 717 P.2d 902 (1986).

Imputed conflicts-of-interest are addressed in ER 1.10(a) of 17A A.R.S. Sup.Ct.Rules, Rule 42, Rules of Professional Conduct, which states:

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by ERs 1.7 or 1.9 unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materiality limiting the representation of the client by the remaining lawyers in the firm.

Applying the language of ER 1.10 to the facts here, it is clear that if one lawyer within the OLA has a conflict-of-interest with representing the Defendant, then that conflict will be imputed to the entire office. The rule does not make exceptions for arbitrary, individualized processes that law offices may choose to adopt in an attempt to avoid a conflict-of-interest, such as having "Counsel's boss . . . retain the file in his office to ensure that no one has access to it without his permission." (Factual Supplement to Motion to Determine Counsel at p. 2)

Regarding a lawyer's ethical duty to a former client, ER 1.9 states:

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by ERs 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

The OLA acknowledges that it represented both A. J. and C.W. in the severance proceeding against K. J. A key issue in the severance determination was K. J.'s substance abuse. That same issue has been the focus of defense motions and arguments in this case – to such a degree that the defense has sought orders from this Court to obtain confidential records regarding K. J. and the severance. In other words, in the severance, the OLA advocated on behalf of their clients A. J. and C.W. based, at least in part, upon K. J.'s substance abuse issues, and now the OLA seeks to utilize that same information in defending the case where A. J. and C. W. are victims. The interests of the Defendant are materially adverse to those of A. J. and C. W., and thus representation of the Defendant by OLA is prohibited by ER 1.9. Further, neither A. J. nor C.W. have given an informed, written, waiver of the OLA's clear conflict-of-interest, as would be required for the OLA to continue to represent the Defendant without violating ER 1.9.

In addition to violating ER 1.9, the OLA's continued representation of the Defendant raises issues under ER 1.7. That rule defines what constitutes a conflict-of-interest between a lawyer and a current client, and provides:

(a) **Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:**

(1) the representation of one client will be directly adverse to another client; or

(2) **there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to** another client, **a former client** or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client gives informed consent, confirmed in writing, and:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; and

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

(Emphasis added.)

Here, the defense continues to seek information regarding K. J.'s substance abuse, juvenile, and adult criminal history. (See Renewed Motion for Discovery of Unredacted Files on [K. J.] from Adult Probation, CPS And Juvenile Court and Request for Disclosure of Assistance from the State.) Much of the information sought is the contained in the OLA's own file from their representation of A. J. and C.W. The OLA is therefore now in the position of being both the possessor and the requester of the

confidential information. It is difficult to imagine how, given this dynamic, there is not a significant risk that the representation of the Defendant will be materially limited by the OLA's responsibility to its former clients, A. J. and C. W.

In addition to the ethical issues raised by the OLA continuing to represent the Defendant, there are significant post-conviction repercussions. If the Defendant is convicted of any of the eight charges against him, he will have the opportunity to seek both appellate and post-conviction relief review. Allowing the OLA to continue to be counsel for the Defendant after discovering they had previously represented two of the victims will undoubtedly raise questions on review, including, but not limited to, ineffective assistance of counsel claims. Even if the Defendant were to waive the OLA's conflict under ER 1.7, that would not preclude him from later obtaining appellate relief on related issues. Therefore, if the OLA is permitted to continue to represent the Defendant, the State will seek either a waiver by the Defendant of his right to relief or findings by this Court to support the appropriateness of the continued legal representation.

In conclusion, the OLA's former representation of two of the victims in this case against a third victim, violates the ethical rules regarding conflict-of-interest, and sets the stage for, *inter alia*, post-conviction ineffective assistance of counsel claims. For the reasons set forth above, the State respectfully asks this Court to remove the OLA from representing the Defendant in this matter.

Submitted September __, 2017.

WILLIAM MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY: /s/
/s/ Elizabeth Ortiz
Special Prosecutor

Copy mailed\delivered
September __, 2017,
to:

The Honorable Joseph Kreamer
Judge of the Superior Court

Susan L. Corey
Peter Jones
Deputy Legal Advocates
222 North Central Avenue, Suite 154
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BY: /s/
/s/ Elizabeth Ortiz
Special Prosecutor